UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JERRY HUDSON,

Plaintiff,

v.

MICHAEL CHERTOFF, *et al.*,

Defendants.

No. C05-01735RSL

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

I. INTRODUCTION

This matter comes before the Court on defendants' "Motion to Dismiss And/Or for Summary Judgment" (Dkt. #19). Plaintiff, an African-American, alleges that he was terminated from his position with United States Customs and Border Protection ("CBP") because of his race, his disability, and in retaliation for making complaints about his employer's discriminatory practices and failures to accommodate his disability. Defendants now move to dismiss plaintiff's claims. For the reasons discussed below, defendants' motion is granted.

II. FACTUAL BACKGROUND

Plaintiff was hired as a Customs Inspector with the United States Customs Service[1] on

[1] In March 2003, the Customs Service and United States Border Patrol were consolidated into the newly formed United States Customs and Border Protection. At that time, the position of "Customs Inspector" was reclassified as a "Customs and Border Protection Officer."

December 23, 2002. Since this was his first position at CBP, plaintiff was appointed as a career conditional employee, which means that he was subject to the completion of a one-year probationary period. This probationary period "is the final, most significant step, in the hiring process for new employees" and is used "to observe an employee's performance and conduct for the purpose of determining fitness for continued and long-term employment." Declaration of Marion J. Mittet ("Mittet Decl.") (Dkt. #20), Ex. B. CBP policy states that "[a]n employee serving a probationary or trial period, who has not achieved competitive status through a prior permanent appointment may be terminated from his/her position with a simple written notice that generally outlines the employee's deficiencies and specifies a termination date." Id. The authority to terminate probationary policies "is delegated to the Directors of Field Operations, Special Agents-in-Charge, and Principal Headquarters Officers." Id. Plaintiff was terminated pursuant to this policy just five days before the expiration of his probationary period. In the letter of termination, Director of Field Operations for the Seattle Field Office, Thomas Hardy, stated that the decision to terminate plaintiff was made for three reasons: (1) his failure to report a bribery attempt in a timely fashion; (2) his inability to fully perform his duties due to his medical condition; and (3) his unexcused absence from work. Mittet Decl., Ex. G.

A. The Bribery Attempt

While on medical leave in August of 2003, plaintiff was approached by an acquaintance and offered a bribe in return for his assistance in moving a large amount of money into Canada from the United States. According to CBP policy at the time, any information relating to bribery or attempted bribery of a CBP employee was to be "immediately reported by the recipient to the Office of Internal Affairs." Mittet Decl., Ex. L. In this instance, plaintiff reported the attempted bribe to his supervisors, Michael Brydie and Kenneth Williams, on September 8, 2003, a week after returning to work from medical leave. On the same day he relayed information about the bribe attempt to supervisors, plaintiff notified Internal Affairs of the incident. At some point thereafter, Internal Affairs conducted an investigation of the incident and referred the matter to

CBP management for further action. Thomas Hardy received his copy of the Internal Affairs report on December 12, 2003.

B. Plaintiff's Knee Injury

Between February and April of 2003 plaintiff injured his knee while attending the Customs Inspector Basic Training Course in Glynco, Georgia. Though plaintiff was able to complete the course and return to work in Blaine, Washington, he soon re-aggravated his injury by tearing his meniscus while on duty in June of 2003. Surgery was conducted to repair the tear on August 8, 2003. Plaintiff was away from work while recovering until September 2, 2003.

On August 28, 2003, CBP's Injury Compensation Coordinator sent a letter to Dr. Michael Gannon, plaintiff's surgeon, to determine what work restrictions would apply to plaintiff when he returned to work. Mittet Decl., Ex. M. In response to the letter, Dr. Gannon submitted a note indicating that plaintiff could engage in "progressive activity as comfort allows" over the next two months and that plaintiff should be excused from work as needed to attend physical therapy appointments. Mittet Decl., Ex. N. Dr. Gannon also submitted a "Duty Status Report" indicating tasks which plaintiff could do "as comfort allows" and other tasks which plaintiff would be able to do in full. Mittet Decl., Ex. O. Upon returning to work, plaintiff was to be assigned to light duty pending his full recovery. Plaintiff contends that he was nevertheless forced into doing work functions beyond light duty despite his doctors orders.

On October 8, 2003, plaintiff submitted a new note from Dr. Gannon indicating that his work restrictions should be extended through December 7, 2003 with the "goal of return to full duty at that time." Mittet Decl., Ex. P. Dr. Gannon submitted an additional note on December 2, 2003, indicating that plaintiff's light duty restrictions should be extended further, and that he would re-evaluate plaintiff's progress in six weeks. Mittet Decl., Ex. Q. A week later, plaintiff sought permission to go on paid leave from December 9 through December 24, 2003 to further treat his knee injury. Mittet Decl., Ex. R. To support this request, plaintiff submitted a note from his primary care physician, Dr. Gidon Fame, which stated that plaintiff required the time

off to "attend phsyiotherapy." Mittet Decl., Ex. S. Plaintiff was then asked to provide a note from Dr. Gannon confirming his leave request, which he subsequently provided to CBP on December 11, 2003. Mittet Decl., Exs. T, U (Dr. Gannon's note simply stated "off work 12/9/03 – 12/24/03 following surgery.").

On December 16, 2003, Area Port Director Margaret Fearon issued a letter to plaintiff indicating that his leave requests had "become confusing" and that the documentation he had provided to support those requests was "contradictory." Mittet Decl., Ex. V. As a result, she denied his leave request, but indicated that he would be assigned to work a later shift doing strictly administrative duties in order to accommodate his need to attend physiotherapy during normal working hours. Id. The letter stated that the temporary assignment would begin on December 17, 2003 and continue for six weeks until January 28, 2004 when it was expected that plaintiff would provide CBP with a prognosis from his physician indicating his expected date of return to full-time status. Id.

On December 17, 2003, the day plaintiff's new assignment was to begin, he failed to arrive at work as scheduled. That same day he called supervisor Kenneth Williams to report that he had been involved in a motor vehicle accident the day prior and attached a note from a physician confirming that he had injured his lower back and his previously injured knee and that he had been advised to rest and attend physiotherapy for two weeks. Mittet Decl., Ex. W. It was the following day, December 18, 2003, that plaintiff was terminated.

C. The Complaint

Five days after his termination, on December 23, 2003, plaintiff sent an e-mail to the EEO office in Seattle, Washington and indicated that he believed that he was improperly terminated due to his race and his disability. Declaration of Hector Steele Rojas ("Rojas Decl.") (Dkt. #23), Ex. T. EEO Intake Officer Linda Barnett followed up on plaintiff's complaint and contacted plaintiff for an interview on December 29, 2003. Mittet Decl., Ex. H. Plaintiff filed a formal complaint on February 26, 2004. Mittet Decl, Ex. I.

On June 23, 2005, EEOC Administrative Judge Zulema Hinojos-Fall issued an order finding that plaintiff had not established a *prima facie* case of race discrimination, because he failed to show that he was treated differently than similarly situated employees outside his protected class. Mittet Decl., Ex. J. Judge Hinojos-Fall also rejected plaintiff's disability discrimination claim after concluding that plaintiff had failed to establish that he was "disabled" under the Rehabilitation Act. Id. Judge Hinojos-Fall did not address plaintiff's retaliation claims.

III. DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if "a reasonable jury could return a verdict for the nonmoving party" and a fact is material if it "might affect the outcome of the suit under the governing law." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The evidence is viewed in the light most favorable to the non-moving party. Id. "[S]ummary judgment should be granted where the nonmoving party fails to offer evidence from which a reasonable jury could return a verdict in its favor," Triton Energy Corp. v. Square D Co., 68 F.3d 1216, 1221 (9th Cir. 1995), or where there is a "complete failure of proof concerning an essential element of the nonmoving party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "The mere existence of a scintilla of evidence in support of the non-moving party's position is not sufficient." Trinton Energy Corp., 68 F.3d at 1221.

B. Racial Discrimination

Under Title VII, disparate treatment of employees based on race is a violation of federal law. Aragon v. Republic Silver State Disposal, Inc., 292 F.3d 654, 658 (9th Cir. 2002). In determining whether plaintiff's Title VII claim can survive summary judgement, the Court

utilizes the burden-shifting framework established by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). See Aragon, 292 F.3d at 658-59. Under that framework, plaintiff must first make out a *prima facie* case of unlawful employment discrimination by demonstrating that: (1) he belonged to a protected class; (2) he was qualified for his position; (3) he was subjected to an adverse employment action; and that (4) similarly situated employees not in his protected class received more favorable treatment. Moran v. Selig, 447 F.3d 748, 753 (9th Cir. 2006).

If plaintiff is successful in establishing a *prima facie* case, the burden shifts to defendants "to articulate a legitimate nondiscriminatory reason for [their] employment decision." Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994) (quoting Lowe v. City of Monrovia, 775 F.2d 998, 1005 (9th Cir. 1985), as amended, 784 F.2d 1407 (9th Cir. 1986)). If defendants are able to rebut the presumption of discrimination raised by the *prima facie* showing, plaintiff must then demonstrate that defendants' articulated reason is a pretext for unlawful discrimination. Aragon, 292 F.3d at 658.

"The requisite degree of proof necessary to establish a *prima facie* case for Title VII . . . on summary judgment is minimal and does not even need to rise to the level of a preponderance of a doubt." Wallis, 26 F.3d at 889. Defendants do not challenge plaintiff's showing of the first three elements, but instead argue that plaintiff's Title VII claim must fail because he has failed to put forward evidence indicating that similarly situated individuals outside of his protected class were treated more favorably than himself. To establish this fourth necessary element, a plaintiff seeking relief "must demonstrate, at the least, that they are similarly situated to those employees in all material respects." Moran, 447 F.3d at 755. In disciplinary cases, where a plaintiff claims that he was punished more harshly than a similarly situated employee based on a prohibited reason, "a plaintiff must show that he is similarly situated with respect to performance, qualifications, and conduct." Radue v. Kimberly-Clark Corp., 219 F.3d 612, 618 (7th Cir. 2000). "This normally entails a showing that the two employees dealt with the same

supervisor, were subject to the same standards, and had engaged in similar conduct without such differentiating or mitigating circumstances as would distinguish their conduct or the employer's treatment of them." Id. at 617-18.

Plaintiff has failed to make such a showing. He attempts to meet his burden by identifying two Caucasian probationary employees who he contends are similarly situated, yet treated more favorably. Plaintiff provides little information about these individuals aside from the fact that they were probationary employees who were not terminated despite being disciplined for "DUI offenses." Without additional information about these individuals, it is impossible to determine if they were similarly situated to plaintiff with regard to qualifications and performance or if they shared the same ultimate supervisor. The absence of this information, on its own, is fatal to plaintiff's race discrimination claim. See Grosz v. The Boeing Co., 455 F. Supp.2d 1033, 1040-41 (C.D. Cal. 2006) (plaintiff's failure to provide "evidence of the job duties, responsibilities, or the type of . . . work being done" by allegedly similarly situated employees entitles defendant to summary judgment on race discrimination claim). Regardless, even if plaintiff had established that these employees were similarly situated with regard to qualifications, performance and supervision, he would have still failed to make a *prima facie* case of race discrimination because he has not established that these allegedly similarly situated employees engaged in similar conduct. Defendants maintain that plaintiff was terminated for his failure to report an attempted bribe in a timely fashion, his inability to perform his job in an adequate fashion due to his knee injury, and his unexcused absence from work on December 17, 2003. These offenses, especially when combined together, are more serious and materially different than a DUI offense. At a basic level, an unreported bribery attempt has the potential to directly implicate the security of the border and the integrity of the CBP. A DUI offense, while serious, does not have similarly far reaching potential consequences. Because plaintiff has failed to identify a truly "similarly situated" CBP employee outside of his protected class who was treated more favorably than himself, the Court "need not

address any of the underlying allegations of disparate treatment" or his pretext argument. Peele v. Country Mutual Ins. Co., 288 F.3d 319, 331-32 (7th Cir. 2002). Defendants' motion for summary judgment on plaintiff's race discrimination claim under Title VII is granted.

C. Rehabilitation Act Claim

Plaintiff also alleges that he was both terminated in violation of the Rehabilitation Act and that defendants failed to make reasonable accommodations as required under the Rehabilitation Act. To make a *prima facie* case under the Rehabilitation Act, a plaintiff must demonstrate that (1) he is a person with a disability, (2) who is otherwise qualified for employment, and (3) that he suffered discrimination because of his disability. Walton v. United States Marshals Serv., No. 05-17308, 2007 WL 1815504, at *4 (9th Cir. June 26, 2007). As a threshold question, the Court must first determine whether plaintiff's knee injury qualifies as a "disability" under the Rehabilitation Act. See Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1353-54 (9th Cir. 1996). "The Americans with Disabilities Act, whose standards of substantive liability are incorporated in the Rehabilitation Act, defines 'disability' as: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual, (B) a record of such an impairment, or (C) being regarded as having such an impairment." Walton, 2007 WL 1815504, at *4. For the reasons described below, the Court concludes that plaintiff has failed to put forward any evidence indicating that his knee injury constitutes a "disability" under the Rehabilitation Act or that his employer regarded the injury as a disability. As such, defendants' motion for summary judgment on plaintiff's Rehabilitation Act claims is granted.

For good reason, plaintiff makes little effort to argue that his knee injury actually constituted a "disability" under the Rehabilitation Act. It is generally the case that "a temporary injury with minimal residual effects cannot be the basis for a sustainable claim under the ADA." Sanders, 91 F.3d at 1354; see also Johnson v. City and County of San Francisco, Nos. C 99-43-4375, 2001 WL 263298, *4 (N.D. Cal. Mar. 8, 2001) (hernia is not a "disability" under the ADA

because it is a temporary condition that can be corrected with surgery); 29 C.F.R. § 1630, App., § 1630.2(j) ("temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities. Such impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza"). Plaintiff has offered no evidence that would indicate his knee injury was anything more than a temporary condition that would cease to hinder his ability to perform the functions of his job once his treatment was complete. In fact, plaintiff's physician indicated in October of 2003 that he believed that plaintiff would be able to return to work full time in December of 2003. Mittet Decl., Ex. P. Though he appears to have re-injured the knee in the December 2003 automobile accident, his physician's note indicates that his new injuries could be treated with anti-inflammatory drugs and approximately two weeks of physiotherapy. Mittet Decl., Ex. W. In short, plaintiff has put forward no evidence indicating that his knee injury was anything more than a temporary injury of approximately six months duration. As such, he has failed to establish that his injury fell within the Rehabilitation Act's definition of "disability." See Sanders, 91 F.3d at 1354.

Even if plaintiff's injury was not temporary, plaintiff's claim would nevertheless fail because he has made no effort to establish that his knee injury substantially limited his ability to engage in any major life activity. See Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184, 195 (2002) ("Merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity" in a "substantial" way). Major life activities include "caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i). Though plaintiff has not specifically identified any of these major life activities as being substantially limited, the Court will infer from the record that he is attempting to argue that his knee injury substantially limited his major life activity of working. But to establish such a limitation, plaintiff must demonstrate that he is "significantly restricted in the ability to perform

either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). Further, "[t]he inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working." Id. In the context of law enforcement, the relevant inquiry is whether plaintiff is "unable to work in the field of law enforcement generally." Papadopoulos v. Modesto Police Dep't., 31 F. Supp.2d 1209, 1220 (E.D. Cal. 1998). Plaintiff has not alleged that he is unable to work in law enforcement generally, nor is there evidence to believe that would be the case. Plaintiff has therefore failed to support any allegation that he is substantially limited in his ability to engage in any major life activity.

Having failed to establish that he was in fact disabled, plaintiff devotes the majority of his argument to the proposition that his employers at CBP regarded him as disabled. "A person is regarded as being disabled if '(1) a covered entity mistakenly believes that a person has a physical impairment that substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.'" Coons v. Sec'y of the United States Dep't of the Treasury, 383 F.3d 879, 886 (9th Cir. 2004). By adding the "regarded as" definition of disability, Congress sought to "protect people from discriminatory actions, based on employer's myths, fears and stereotypes about disability, which may occur even where a person does not actually have an actual disability." Papadopoulos, 31 F. Supp.2d at 1218. In support of this argument plaintiff can only point to the fact that his supervisors were aware that he needed rehabilitation to treat his injury.[2] This, however, is not sufficient to survive summary judgment. Instead, plaintiff must advance evidence indicating that his supervisors believed that he had a "physical impairment that substantially limits one or more major life activities." Plaintiff, however, has

[2] Plaintiff appears to believe that his supervisors' awareness of his knee injury constitutes evidence that they believed he was disabled. In doing so, plaintiff confuses the ordinary meaning of the word "disabled" with the term of art contained in the Rehabilitation Act. See Sanders, 91 F.3d at 1354 n.2 ("a person may be 'disabled' in the ordinary usage sense, or even for the purposes of receiving disability benefits from the government, yet still not be 'disabled' under the ADA.").

put forward no evidence indicating that anyone at CBP believed his injury to be anything other than temporary. Without such evidence, his "regarded as disabled" theory of liability under the Rehabilitation Act cannot survive summary judgment.[3] Thompson v. Holy Family Hospital, 121 F.3d 537, 541 (9th Cir. 1997).

D. Retaliation Claim

1. Exhaustion of Administrative Remedies

Plaintiff also alleges that his employment was improperly "terminated because of his complaints to his supervisors about racially discriminatory practices and tensions at the Blaine post and also about violations of the Rehabilitation Act by management in violation of Title VII." Complaint at 8-9. Defendants argue that this Court lacks subject matter jurisdiction over such a claim because plaintiff failed to exhaust his administrative remedies by not alleging retaliation during EEO counseling process. See Lyons v. England, 307 F.3d 1092, 1103 (9th Cir. 2002). "The administrative charge requirement serves the important purposes of giving the charged party notice of the claim and 'narrow[ing] the issues for prompt adjudication and decision.'" Park v. Howard Univ., 71 F.3d 904, 907 (D.C. Cir. 1995) (quoting Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472 n. 325 (D.C. Cir. 1976)). As such, "[i]ncidents of discrimination not included in an EEOC charge may not be considered by a federal court unless the new claims are 'like or reasonably related to the allegations contained in the EEOC charge.'" Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1475-76 (quoting Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726, 729 (9th Cir. 1984). In evaluating whether claims not included are sufficiently related to those made in the EEO charge, "it is appropriate to consider such factors as the alleged basis of the discrimination, dates of discriminatory acts specified within the charge, perpetrators of discrimination named in the charge, and any locations at which discrimination is alleged to have occurred." B.K.B. v.

[3] Because plaintiff has not advanced evidence to support his claim that he was "disabled" under the Rehabilitation Act, it is unnecessary to reach the issue of whether he was provided with "reasonable accommodation." Sanders, 91 F.3d at 1353; see also Coons, 383 F.3d at 886 n.3.

Maui Police Dep't., 276 F.3d 1091, 1100 (9th Cir. 2002).

The Court's exhaustion analysis thus requires that two questions be answered. First, were plaintiff's retaliation claims contained in his initial EEO complaint? Second, if they were not, are his retaliation claims "like or reasonably related to the allegations contained in the EEOC charge[?]" Green, 883 F.2d at 1475-76. The Court analyzes each retaliation claim in turn.

With regard to plaintiff's allegations that he was fired in retaliation for his complaints to supervisors regarding violations of the Rehabilitation Act, it is apparent that such allegations were either raised by plaintiff in the EEO process or, at the very least, reasonably related to his allegations that he was terminated due to his disability. Plaintiff's unsworn declaration and formal complaint contain a multitude of references to concerns that he was terminated in response to his efforts to obtain accommodations for his disability. For instance, in his unsworn declaration, plaintiff stated that he made the decision to have a union representative accompany him to meetings with Branch Chief Phillip Stanford in December 2003 because plaintiff believed that management had begun to regard him as a "problem employee" that they "wished to get rid of" due to his complaints regarding management's treatment of his disability. Rojas Decl., Ex. K at p. 6. In his formal complaint, plaintiff made additional references to Stanford's adverse reaction to his accommodation requests and alleged that he was fired in part out of Stanford's desire to "cover for" CBP's "mishandling" of his "injury issues." Rojas Decl., Ex. E-1 at p. 8. He went on to allege that Stanford "purposely singled [plaintiff] out, retaliated, harassed and went out of his way to fire" plaintiff both because of his racist attitudes toward African-Americans, but also because of his "mishandling of my disability issues." Id. at 9. Though a retaliation claim may not have been stated with the clarity that one would expect from a lawyer, plaintiff is not a lawyer, and the language used by in his EEO charge is to be construed liberally and "should not be held to the higher standard of legal pleading by which we would review a civil complaint." B.K.B. v. Maui Police Dep't., 276 F.3d 1091, 1103 (9th Cir. 2002). The Court therefore concludes that it has subject matter jurisdiction over plaintiff's retaliation claim

related to his efforts to obtain accommodations for his disability because such a claim is contained in his initial complaint and is "reasonably related to [his] original theory of the case" as laid out in the factual allegations of his charge. Id. at 1102.

Plaintiff's retaliation claim involving his complaints to management about racially discriminatory practices is a closer issue. In his response to defendants' motion, plaintiff fails to identify any statement in the EEO investigation record that would indicate that he had alleged that he had been fired in retaliation for making complaints to his supervisors about racial discrimination. Nor does he articulate any reason why such an EEO investigation of such retaliation could "reasonably be expected to grow out of" his articulated claim of racial discrimination. Sosa v. Hiraoka, 920 F.2d 1451, 1456 (9th Cir. 1990) (quoting Green, 883 F.2d at 1476). Though both his retaliation claim and his race discrimination claim relate to the racial climate at Blaine, both claims are distinct and involve separate factual inquiries. Unlike plaintiff's retaliation claim relating to his requests for accommodation, the alleged "protected activity" relevant to this claim does not involve facts that would necessarily be part of the EEO's underlying discrimination investigation. Because plaintiff has failed to identify any evidence in the underlying EEO record that would indicate that he notified investigators that he had made earlier complaints to supervisors relating to his concerns of racial discrimination, there is no reason to believe that retaliation claims would be uncovered by the general investigation of plaintiff's race discrimination claim. The Court, therefore, concludes that plaintiff failed to properly exhaust his administrative remedies with regard to this retaliation claim. See McKenzie v. Illinois Dep't of Trans., 92 F.3d 473, 482-83 (7th Cir. 1996) (dismissing retaliation claim on similar grounds where retaliation claim could have been alleged in the EEOC charge, but was not). Defendants' motion to dismiss this claim is granted.

2. Rehabilitation Act Retaliation Claim

Having determined that the Court has subject matter jurisdiction over plaintiff's retaliation claim under the Rehabilitation Act, the next question is whether plaintiff's claim can survive summary judgment. See Coons, 383 F.3d at 887 (even when a plaintiff is deemed to not

be a "qualified individual with a disability," they may still pursue a retaliation claim under the Rehabilitation Act provided that the employee sought accommodation in good faith); see also Heisler v. Metro. Council, 339 F.3d 622, 630-32 (8th Cir. 2003). To make a *prima facie* showing of retaliation, a plaintiff must show: "(1) involvement in a protected activity, (2) an adverse employment action and (3) a causal link between the two." Brown v. City of Tucson, 336 F.3d 1181, 1187 (9th Cir. 2003). To establish a causal link, "[t]he plaintiff must present 'evidence adequate to create an inference that an employment decision was *based on* an illegal discriminatory criterion." Coons, 383 F.3d at 887 (quoting O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996)) (emphasis in original). Put differently, to establish causation, plaintiff must show "by a preponderance of the evidence that engaging in the protected activity was one of the reasons for [his] firing and that but for such activity [he] would not have been fired." Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1064 -1065 (9th Cir. 2002) (quoting Ruggles v. California Polytechnic State Univ., 797 F.2d 782, 785 (9th Cir.1986)).

If plaintiff can establish a *prima facie* case, the burden shifts to defendants to present legitimate reasons for plaintiff's termination. Id. If defendant presents legitimate reasons for plaintiff's termination, plaintiff then must demonstrate genuine issues of material fact as to whether defendants' explanation was a pretext for a retaliatory purpose. Id.

The Court concludes that plaintiff has failed to establish a *prima facie* case of retaliation. While the Court agrees that requesting an accommodation under the Rehabilitation Act is a protected activity, McAlindin v. County of San Diego, 192 F.3d 1226, 1238 (9th Cir. 1999), and that plaintiff suffered an adverse employment action when he was terminated, plaintiff has failed to establish a causal link between his protected activity and his termination. In support of his contention that such a causal link exists, plaintiff relies solely on the temporal proximity between his termination and his complaints. Response at p. 24. Though plaintiff is indeed correct that causation "may be inferred from circumstantial evidence, such as the employer's knowledge that the plaintiff engaged in protected activities and the proximity in time between the protected action and the allegedly retaliatory employment decision," Yartzoff v. Thomas,

809 F.2d 1371, 1376 (9th Cir. 1987), such proximity does not necessarily lead to the conclusion that there is a causal connection between events in all circumstances. See Villiarimo, 281 F.3d at 1065 ("timing alone will not show causation in all cases"). While it is true that plaintiff made requests for accommodation in the weeks prior to his termination in December 2003, he first began making requests for accommodation in early August of 2003, more than four months prior to his termination. Gaps of four months time between the initiation of the protected activity and the adverse employment action has been held by other courts to be too distant to establish a *prima facie* case without other evidence. See Filipovic v. K & R Express Sys., Inc., 176 F.3d 390, 399 (7th Cir. 1999); Conner v. Schnuck Markets, Inc., 121 F.3d 1390, 1395 (10th Cir. 1997) (four month time gap not enough without additional evidence to create inference of causation).

The Court believes the distance in time between plaintiff's initial requests for accommodation and his eventual termination is too great to create a causal link on its own. If anything, the evidence demonstrates that plaintiff's requests for accommodations, with some exceptions, were met with efforts to accommodate plaintiff's physical restrictions. Indeed, as late as December 16, 2003, plaintiff was assigned to administrative duties in response to his need to attend physiotherapy. It was only after plaintiff reached the end of his probationary period and Thomas Hardy received the report from Internal Affairs on December 12, 2003, detailing plaintiff's failure to report the bribery attempt and his refusal to participate in the investigation that plaintiff was terminated. If causation is to be inferred from timing, the natural conclusion would be to correlate plaintiff's termination to these events.

Further, plaintiff has failed to put forward any evidence that would indicate that Thomas Hardy, the CBP official ultimately responsible for his termination, was even aware of plaintiff's dissatisfaction with CBP over his perceived lack of accommodation. Without such evidence, causation cannot be established. See Cohen v. Fred Meyer, Inc., 686 F.2d 793, (9th Cir. 1982) (failure to establish relevant supervisor's knowledge of protected activity is fatal to establishment of a *prima facie* case). Though temporal proximity may in some instances be

sufficient to establish a causal connection between a protected activity and an adverse employment decision, the Court concludes that such proximity is not sufficient, on its own, to create such a connection in this case.

Even if the temporal proximity between plaintiff's request for accommodation and his termination was sufficient, on its own, to create a *prima facie* case for retaliation,[4] defendants' motion for summary judgement would still be granted because plaintiff has failed to demonstrate pretext "'either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" Chuang v. Univ. of Cal. Davis, 225 F.3d 1115, 1124 (9th Cir. 2000) (quoting Tex. Dep't of Comty. Affairs v. Burdine, 450 U.S. 248, 256 (1981)). When a plaintiff attempts to prove pretext with circumstantial evidence, as is the case here, he must do so with "specific" and "substantial" evidence "that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not believable." Godwin v. Hunt Wesson, Inc., 150 F.3d 1217, 1222 (9th Cir. 1998). Plaintiff has made no effort to make such a showing and instead relies solely on the temporal proximity between his termination and his complaints. This does not constitute "specific" or "substantial" evidence that would lead a rational trier of fact to conclude that CBP's concerns about plaintiff's response to the bribery attempt, his failure to cooperate with a further investigation of the bribery attempt, and his numerous absences were simply a "pretext" for CBP's desire to retaliate against plaintiff for his complaints regarding his perceived lack of accommodations. In the absence of such evidence, defendants' motion for summary judgment must be granted.

[4] As discussed earlier in the order, defendants have satisfied their burden in presenting legitimate reasons for plaintiff's termination. These reasons include plaintiff's failure to timely report a bribe, his inability to perform his position due to his medical condition and his unexcused absence.

IV. CONCLUSION

For all the foregoing reasons, defendants' motion to dismiss and for summary judgment (Dkt. #19) is GRANTED.

DATED this 3rd day of August, 2007.

Robert S. Lasnik
United States District Judge